

RECEIVED

MAY 04 2012

DEVELOPMENT SERVICES

**CLOSED RECORD APPEAL BEFORE THE
CITY OF EDMONDS COUNCIL**

RE: Burnstead Construction Company
Woodway Elementary Plat
Re-Hearing
P-2007-17, PRD-2007-18

BURNSTEAD'S RESPONSE
TO APPEALS

I. SUMMARY OF ARGUMENT

Burnstead Construction Company ("Burnstead") requests the City Council to affirm the Hearing Examiner's approval of Burnstead's planned residential development ("PRD") and preliminary plat ("the project"), with the conditions noted in the Hearing Examiner's decision. This has been a uniquely frustrating and very expensive land use process for Burnstead. It sought approval of its preliminary plat and PRD more than five years ago. Since March 2007, Burnstead has been forced to deal with vexatious litigation and irrational attacks on its project by unreasonable neighboring property owners.

It is vital that the City Council keep at the forefront of all its deliberations on this matter that, as a result of the Court of Appeals' decision, only three narrow issues remained on remand and the Hearing Examiner's decision correctly addressed those issues. The issues on remand

1 were: (1) the drainage plan, (2), the perimeter buffer, and (3) open space. In contravention of
2 the Court of Appeals' decision, the appellants have gone to great lengths to expand the City
3 Council's review, which the Council is compelled by law to reject.

4 With respect to the issues before the Council, after the case was remanded for further
5 proceedings, Burnstead submitted revised preliminary plat/PRD plans and updated the storm
6 drainage report. To achieve its objective of gaining approval of the project with as little
7 controversy as possible, Burnstead revised its design so the perimeter lots would have standard
8 RS-8 zoning setbacks. This meant the perimeter buffer is no longer required under City Code.
9 Also, because no perimeter buffer is required, there is no double counting of buffer and open
10 space, and City Staff and the Hearing Examiner correctly concluded that the project complies
11 with open space code requirements.

12 Thus, while the appellants will strenuously argue otherwise, the only substantive issue
13 before the Council is whether the Hearing Examiner correctly concluded that Burnstead's revised
14 drainage report and plan complies with code requirements. The City Council should reject each
15 appeal and affirm the Hearing Examiner's decision.¹

16 17 **II. PROCEDURAL CHALLENGES TO APPEALS**

18 **A. Sanderlin and Miller Appeals were untimely and must be dismissed.**

19 The appeals filed by Cliff Sanderlin and Heather Marks ("Sanderlin Appeal") and by
20 Richard K. Miller, Darlene Miller, Constantinos N. Tagios and Sophia Tagios (collectively,
21 "Miller Appeal") were not timely filed under the Edmonds Community Development Code
22 ("ECDC") and must be dismissed. The Hearing Examiner's Order on Request for
23

24 ¹ For efficiency, Burnstead will address all four appeals in this one response and, as the applicant,
25 reserves the right to submit a surrebuttal under ECDC 20.07.005 (D).

1 Reconsideration was issued on March 19, 2012. The Sanderlin Appeal and the Miller Appeal
2 were received by the City on April 3, 2012, 15 days later. Under ECDC 20.07.004(B), "an
3 appeal must be filed within 14 days after the issuance of the hearing body's written decision. . . .
4 Appeals, including fees, must be received by the city's development services department by mail
5 or by personal delivery at or before 4:00 p.m. on the last business day of the appeal period.
6 Appeals received by mail after 4:00 p.m. on the last day of the appeal period will not be
7 accepted, no matter when such appeals were mailed or postmarked." (Emphasis added)

8 ECDC 20.06.010 states that when there has been reconsideration of a hearing examiner's
9 decision, which was the case here, "for the purposes of computing the time for filing a request
10 for reconsideration, the day the hearing examiner's decision is issued shall not be counted."
11 There is no provision in the ECDC that would allow the appeal time period to start other than the
12 day after the Hearing Examiner's decision was issued. The decision was issued on March 19, the
13 appeal period commenced on March 20 and 14 days thereafter was April 2, 2012. The Sanderlin
14 Appeal and the Miller Appeal must be dismissed.

15
16 B. Appellants fail to comply with the requirements for closed record appeals.

17 On several bases, the appellants have not complied with the requirements for Closed
18 Record Appeals set forth in ECDC 20.07. First, each appeal and the written argument in support
19 of the appeal attempts to bring new facts before the City Council, which is expressly prohibited.
20 Under ECDC 20.07.001(A), a "closed record appeal" is "an administrative appeal on the record
21 to the city council, following an open record public hearing on a development project permit
22 application when the appeal is on the record with no new evidence or information allowed to be
23 submitted, except as provided in ECDC 20.07.005(B), and only appeal argument allowed."
24
25

1 ECDC 20.07.005 provides that "closed record appeals shall be based on the record established at
2 the open record hearing before the hearing body/officer whose decision is appealed."

3 Appeal arguments must "describe the particular errors committed by the decisionmaker,
4 with specific references to the administrative record." ECDC 20.07.005(C). The Miller Appeal
5 contains no references to the administrative record and is replete with factual allegations that are
6 not found in the record. For instance, pages three and four of the Miller Appeal (sub-paragraphs
7 i through iv) contain a litany of factual allegations and assertions that cannot be found in the
8 administrative record. The City Council must not consider those arguments.

9 Although the Petso Appeal begins with citations to the administrative record, Council
10 Member Petso abandons this practice when there is no support for her claims. As an example,
11 Council Member Petso asserts that "[t]he 2012 plat renders 50% of the home designs unable to
12 fit on any of the 21 perimeter lots." This assertion is both untrue² and unsupported by anything
13 in the administrative record. In addition to raising wildlife issues completely beyond the scope
14 of the issues on remand, the Sanderlin Appeal asks the City Council to add new exhibits to the
15 record, in blatant disregard of the closed record appeal requirements. ECDC 20.07.005(F)
16 ("Exhibits that are not already in the record shall not be allowed.").

18 Second, each appeal ignores the requirement that "all written submittals should be typed
19 on letter size paper . . . double spaced and without exceeding 12 pages in length, including
20 exhibits." ECDC 20.07.005(F). Each of the three written submissions is single-spaced and
21 exceeds the page-limit requirements – the Petso Appeal is almost 8 pages, single-spaced; the
22

23 ² At this point in the permitting process, Burnstead has not submitted any building permit applications
24 that provide measurements or floor area calculations. Council Member Petso appears to make
25 assumptions based on not-to-scale exterior sketches of a typical Burnstead product that were submitted to the ADB. Burnstead's designs can all be modified to fit any lot.

1 Sanderlin Appeal is 21 pages including the new exhibit, single-spaced; and the Miller Appeal is
2 7 pages, single-spaced.

3 Finally, although Ira Shelton and Kathie Ledger filed an appeal ("Shelton Appeal"), they
4 did not timely provide a written submission in support of their appeal. To the extent the City
5 were to consider the issues raised, the Shelton Appeal fails to comply with the closed record
6 hearing process on several bases, including no references to the administrative record and
7 allegations of facts that are not found in the administrative record. Moreover, the Shelton
8 Appeal attempts to argue issues clearly outside of the remand issues, including traffic and fire
9 safety, boundary line complaints, traffic impacts, wildlife and parking problems. The Shelton
10 Appeal should be dismissed by the City Council.

11 III. STATEMENT OF FACTS

12 A. Initial administrative proceedings in 2007.

13 The subject property is a single parcel of land totaling approximately 5.61 acres and
14 located at 23708 – 104th Avenue West in the City of Edmonds (the "Property"). Burnstead
15 purchased the Property from the Edmonds School District in 2006. The Property is zoned RS-8
16 and designated as "Single-Family-Urban 1" by the City's Comprehensive Plan, which allows for
17 5.5 residential dwelling units per acre. In 2007, Burnstead applied for approval of a preliminary
18 plat containing 27 residential lots and 6 separate tracts for open and recreational space, private
19 driveways and drainage.
20

21 The City issued a State Environmental Policy Act ("SEPA") Mitigated Determination of
22 Non-Significance ("MDNS") for the project on April 19, 2007. The MDNS concluded that the
23 proposed development would not cause significant environmental impacts, provided that
24 Burnstead ultimately implements a series of mitigation conditions. An open record public
25

1 hearing was held before the City Hearing Examiner with regard to Burnstead's preliminary plat
2 application. On July 20, 2007, the Hearing Examiner issued a 43-page Findings, Conclusion and
3 Decision approving the preliminary plat, subject to various conditions, and remanded the PRD
4 for two limited purposes.

5 B. Initial appeals to Edmonds City Council

6 On August 2, 2007, Council Member Petso appealed the Hearing Examiner's approval of
7 the preliminary plat to the Edmonds City Council. The Council then deliberated on the appeal
8 and concurred with recommendations of the Mayor and Staff to uphold the Hearing Examiner's
9 decision. The Council concluded that the preliminary plat, as conditioned, satisfied the City
10 Code and was consistent with the City's Comprehensive Plan. The Hearing Examiner also
11 granted PRD approval on September 28, 2007.

12 C. Appeal to Superior Court

13 On October 12, 2007, Council Member Petso appealed the Hearing Examiner's approval
14 of the PRD and the City Council's decision upholding preliminary plat approval to the
15 Snohomish County Superior Court under the Land Use Petition Act ("LUPA"). More than 16
16 months later, the Superior Court finally issued its decision on February 25, 2009, reversing the
17 City's approval of the MDNS, preliminary plat approval, and PRD approval.

18 D. Appeal to Court of Appeals, Division One.

19 Burnstead then appealed the Superior Court's decision to Division One of the
20 Washington Court of Appeals. On April 4, 2011, the Court of Appeals issued its decision,
21 remanding the matter "to the hearing examiner for further proceedings that are not inconsistent
22 with this opinion." The Court stated that "those proceedings should be limited to addressing the
23
24
25

1 issues concerning the drainage plan, the perimeter buffer, and open space that we discuss in this
2 opinion.”

3 E. Remand proceedings before Hearing Examiner.

4 After the Court of Appeals issued its decision, Burnstead worked with City Staff and
5 made revisions to its application to address the three narrow issues on remand: (1) the drainage
6 plan, (2) the perimeter buffer, and (3) open space. The Hearing Examiner conducted an open
7 record re-hearing pursuant to ECDC 20.06 on Burnstead’s revised application on February 9,
8 2012. At the re-hearing, Burnstead fully supported the City’s conclusions and recommendations
9 for approval of the plat. On March 7, 2012, the Hearing Examiner issued her decision and
10 approved, subject to certain conditions that Burnstead has not appealed, Burnstead’s revised
11 PRD and preliminary plat.

12 On March 15, 2012, the City filed a Request for Reconsideration and sought clarification
13 on three, relatively minor issues. Burnstead did not oppose the Request for Reconsideration and
14 the Hearing Examiner issued her Order on Request for Reconsideration on March 19, 2012.

15 These four appeals (only two timely-filed) followed the Hearing Examiner’s decision to
16 grant approval of the PRD and preliminary plat with conditions.

17
18 IV. ARGUMENT

19 A. Appellants must demonstrate that the Hearing Examiner’s decision was clearly
20 erroneous.

21 Under ECDC 20.07.005(C), “[p]arties to the appeal may present written arguments to the
22 City Council. Arguments shall describe the particular errors committed by the decisionmaker,
23 with specific references to the administrative record. The appellant shall bear the burden to
24 demonstrate that the decision is clearly erroneous given the record.” (Emphasis added) The City
25

1 Council must determine whether the Hearing Examiner's decision was "clearly erroneous given
2 the evidence in the record." ECDC 20.07.005(H). The "clearly erroneous" standard in the
3 context of a land use decision means that the Council may reverse an administrative
4 determination only when, after considering the entire record, it is left with the "definite and firm
5 conviction that a mistake has been committed." *King Cnty. v. Boundary Review Bd.*, 122 Wn.2d
6 648, 661 (1993) (quoting *Norway Hill Pres. & Prot. Ass'n v. King Cnty.*, 87 Wn.2d 267, 274
7 (1976)). In addition, the Council is required by Washington law to give deference to the factual
8 findings of the highest forum that exercised fact-finding authority, in this case the Hearing
9 Examiner. *Chinn v. City of Spokane*, 157 Wn. App. 294, 298 (2010).

10 Under these standards, each appeals fails, by a wide margin, to demonstrate the Hearing
11 Examiner's decision was "clearly erroneous."

12 B. Burnstead's drainage plan for the project is appropriate and meets Code.

13 The most significant change made by Burnstead to its project after the Court of Appeals
14 remanded the matter back to the City was to revise its drainage plan, in recognition that the
15 neighboring property owners were concerned about storm water events and flooding. The new
16 drainage plan is very conservative, assuming worst case scenarios for storm water management.
17 Burnstead took this action at considerable expense.

18 City Staff reviewed the revised drainage report and concluded that:

19 The Preliminary Storm Drainage Report prepared by BlueLine for Burnstead
20 Construction dated January 13, 2012 provides a conservative approach for
21 meeting the stormwater management requirements for the development. The city
22 concurs that infiltration is a feasible approach at the subject site. During the civil
23 plan review phase of the development process (the final utility design phase), the
24 drainage design will undergo technical review and final sizing and design of the
25 system will be determined at that time.

1 Record at 46-47. The Hearing Examiner concluded that Burnstead “has demonstrated through
2 expert testimony that stormwater impacts may be fully mitigated in accordance with the
3 *Stormwater Management Manual for the Puget Sound Basin*, Department of Ecology (1992).”

4 Record at 20. Importantly, those opposing the project at the hearing, including the appellants,
5 provided no expert testimony to contradict the opinion of the City Staff and its engineering
6 department or the consulting expert retained by Burnstead. *Id.* Notwithstanding the arguments
7 and allegations made by the appellants, there simply are no facts or expert opinion in the record
8 that support their position. The City Council would have no legal basis to reverse the Hearing
9 Examiner’s conclusion that the revised drainage plan complies with ECDC 18.30 and the 1992
10 Ecology stormwater manual, that the Hearing Examiner concluded Burnstead vested to, in all
11 respects. Record at 20-22.

12 C. Council Member Petso’s SEPA review argument has no merit.

13
14 In a further attempt to substantially expand the scope of review beyond what was ordered
15 by the Court of Appeals, the Petso Appeal contends that “the hearing examiner erred in relying
16 on the invalidated MDNS to replace the SEPA review she was obligated to perform.” This
17 statement is inaccurate. As the Hearing Examiner noted, “the original MDNS was subject to
18 appeals which were denied by the City” and the SEPA decision was not mentioned as a remand
19 issue by the Court of Appeals.³ There is no legal basis for modifying the Hearing Examiner’s
20 decision that the April 2007 MDNS should be “retained in its entirety.”

21
22 ³ In the appeal to the Court of Appeals, the Court stood “in the shoes of the superior court and
23 review[ed] the hearing examiner’s action on the basis of the administrative record.” *Pavlina v. City of*
24 *Vancouver*, 122 Wn. App. 520, 525 (2004). Even though Council Member Petso prevailed at the superior
25 court, she had the burden of proving that the Hearing Examiner’s 2007 decision was clearly erroneous.
Pinecrest Homeowners Ass’n v. Cloninger & Assoc., 151 Wn.2d 279, 288 (2004). She failed to do so
except on the three issues identified by the Court of Appeals.

1 D. The preliminary plat complies with PRD ordinance, including ADB approval.

2 In her decision approving the preliminary plat and PRD, the Hearing Examiner
3 exhaustively reviewed the requirements for a planned residential development within the City
4 under ECDC 20.35. It is critical to remember, once more, that the Hearing Examiner's 2007
5 approval of the preliminary plat and PRD (and affirmed by the City Council) can only be
6 disturbed by the Council if Burnstead's proposed changes to the project would result in the
7 project not complying with the PRD ordinance. This is not the case. Burnstead's removal of the
8 perimeter buffer was not a substantial revision to the project and the Hearing Examiner
9 concluded that that the project complies with the PRD requirements.

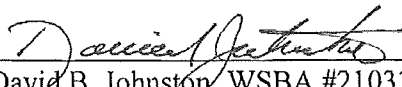
10 With respect to the argument that the project requires a second round of ADB approval,
11 the appellants misconstrue the nature of a *preliminary* plat approval. The ADB's original
12 approval was based on a review of conceptual plans and such plans expressly "were not binding
13 in nature." Record at 19. In addition, City Staff testified that the changes proposed by Burnstead
14 were "minor in nature" and therefore there was no need to have the ADB review the modified
15 application and the Hearing Examiner agreed with this conclusion. Record at 19 and 44.
16 Moreover, the ADB approval has not lapsed. ECDC 20.12.090 provides that "in the event of an
17 appeal, the date of the approval shall be the date on which a final decision is entered by the city
18 council or court of competent jurisdiction." Unfortunately, there has been no final approval and
19 thus the ADB decision remains in place. When the project progresses further and Burnstead
20 applies for building permits, the ADB will review the house designs for compliance with ECDC
21 20.35.060. Record at 19. Burnstead has not opposed this condition. City Staff supported this
22 conclusion at the hearing because the changes to the perimeter buffer were minor in nature and
23 no further review by the ADB is required.
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

V. CONCLUSION

For the reasons set forth, Burnstead respectfully requests the City Council to reject the appeals and affirm the Hearing Examiner's decision.

Dated this 4th day of May, 2012


David B. Johnston, WSBA #21033
Kevin B. Hansen, WSBA #28349
Livengood Fitzgerald & Alskog, PLLC
121 Third Avenue
P.O. Box 908
Kirkland, WA 98083-0908
Ph: 425-822-9281
Fax: 425-828-0908
E-mail: johnston@lfa-law.com
hansen@lfa-law.com
Attorneys for Respondent
Burnstead Construction Co.

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on May 4, 2012, I caused service of the foregoing to the following parties of record:

<i>City of Edmonds:</i> Kernen Lien Associate Planner City of Edmonds 121 – 5 th Avenue North Edmonds, WA 98020 Ph: 425-771-0220 Email: lien@ci.edmonds.wa.us	<input type="checkbox"/> via U.S. Mail <input type="checkbox"/> via Hand Delivery <input type="checkbox"/> E-Service <input type="checkbox"/> via Facsimile <input checked="" type="checkbox"/> via E-mail <input type="checkbox"/> via Overnight Mail
<i>Appellants:</i> Lora Petso Colin Southcote-Want 10616 – 237 th Place SW Edmonds, WA 98020 WSBA #17277 Ph: 206-542-7421 E-mail: lora.petso@ci.edmonds.wa.us	<input type="checkbox"/> via U.S. Mail <input type="checkbox"/> via Hand Delivery <input checked="" type="checkbox"/> E-Service through City of Edmonds <input type="checkbox"/> via Facsimile <input type="checkbox"/> via E-mail <input type="checkbox"/> via Overnight Mail
<i>Appellants:</i> Ira Shelton Kathie Ledger 10617 – 237 th Place SW Edmonds, WA 98020	<input type="checkbox"/> via U.S. Mail <input type="checkbox"/> via Hand Delivery <input checked="" type="checkbox"/> E-Service through City of Edmonds <input type="checkbox"/> via Facsimile <input type="checkbox"/> via E-mail <input type="checkbox"/> via Overnight Mail
<i>Appellants:</i> Cliff Sanderlin Heather Marks 10522 – 235 th Place SW Edmonds, WA 98020	<input type="checkbox"/> via U.S. Mail <input type="checkbox"/> via Hand Delivery <input checked="" type="checkbox"/> E-Service through City of Edmonds <input type="checkbox"/> via Facsimile <input type="checkbox"/> via E-mail <input type="checkbox"/> via Overnight Mail
<i>Appellants:</i> Richard K. Miller Darlene C. Miller 23623 – 107 th Place W Edmonds, WA 98020	<input type="checkbox"/> via U.S. Mail <input type="checkbox"/> via Hand Delivery <input checked="" type="checkbox"/> E-Service through City of Edmonds <input type="checkbox"/> via Facsimile <input type="checkbox"/> via E-mail <input type="checkbox"/> via Overnight Mail

Appellants:

Constantinos N. Tagios
Sophia Tagios
23613 – 107th Place W
Edmonds, WA 98020

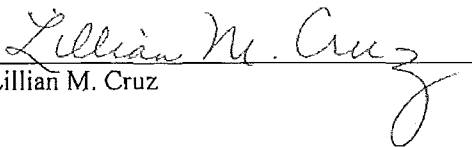
- ☐ via U.S. Mail
☐ via Hand Delivery
☒ E-Service through City of Edmonds
☐ via Facsimile
☐ via E-mail
☐ via Overnight Mail

Attorney for Respondent City of Edmonds:

Jeffrey B. Taraday
Lighthouse Law Group PLLC
1100 Dexter Avenue N, Suite 100
Seattle, WA 98109-3598
WSBA #28182
Ph: 206-273-7440
Fax: 206-273-7401
E-mail: jeff@lighthouselawgroup.com

- ☐ via U.S. Mail
☐ via Hand Delivery
☐ E-Service
☐ via Facsimile
☒ via E-mail
☐ via Overnight Mail

Dated: May 4, 2012


Lillian M. Cruz

G:\obj\Burnstead Const\Petro Appeal\Closed - Appeal\Uld Appeal Response 5-4-12 (FINAL).docx